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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 338.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEARST PUBLICATIONS, INCORPORATED,

Respondent.

PETITION FOR REHEARING.

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SUBJECT INDEX.

PAGE

1. This Court has departed from precedents established by the Federal courts for the interpretation of Federal social legislation and has failed to establish any rule or guide to replace them 1

2. The Court has upheld the Board's findings of fact affecting a group of 210 to 219 vendors but actualy based on the testimony of only a select few of the group..... 4

Certificate of counsel..... 10

TABLE OF AUTHORITIES CITED.

	PAGE
H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514	7
Houston Chronicle Case, 28 N. L. R. B. 1043	3
International Ass'n of Machinists v. N. L. R. B., 311 U. S. 72	7
Milk Wagon Drivers Union No. 753 v. Lake Farm Products, Inc., 311 U. S. 91	7
National Labor Relations Board v. Blount, 131 Fed. (2d) 585	7
National Labor Relations Board v Condenser Corp. of America, 128 Fed. (2d) 67	7
North Whittier Heights Citrus Ass'n v. N. L. R. B., 109 Fed. (2d) 76	7
Parker v. Motor Boat Sales, Inc., 314 U. S. 244	7
South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251	7
Walker v. Altmeyer, 137 L. Ed. (2d) 531	7

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hearst Publications, Incorporated, Respondent herein (Case No. 338), respectfully petitions for a rehearing upon the following grounds:

1. **This Court Has Departed From Precedents Established by the Federal Courts for the Interpretation of Federal Social Legislation and Has Failed to Establish Any Rule or Guide to Replace Them.**

"The prophecies of what the Courts will do in fact, and nothing more pretentious, are what I mean by the law."

Mr. Justice Holmes.

> "Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common-law processes would become the most intolerable kind of *ex post facto* judicial law making."
>
> *Mr. Justice Jackson.*

This Court's opinion belabors the point, "Thence 'technical concepts pertinent to an employer's legal responsibility to third persons for the act of his servants,' have been rejected in various applications of this Act there (citing authorities) and in other federal courts (citing authorities)."

Respondent urged in its brief that his Court follow the rule that Congress must have intended to use the word employee in its ordinary, accepted and conventional sense. Respondent cited many federal court cases construing the Social Security Act, the Federal Employers' Liability Act, the Fair Labor Standards Act and the Federal Safety Appliance Act,[1] all acts of national scope and all holding that an "employee" under those acts is "one who meets the test of the more or less established concept of the legal relationship of employer and employee."

The supposed difficulties of administration adverted to by the Court[2] patently do not embarrass the administration of the Federal Acts above named, even though administration is guided by the many well reasoned opinions of the Federal District and Circuit Courts cited. The au-

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[1]Respondent's Brief, pp. 37-40.

[2]Opinion, p. 8.

thority of all these cases must now be deemed questionable. Yet nothing is established by this Court's opinion to take their place, except the nebulous, uncertain and variable opinion of a supposed expert Board that a particular status is one of employment because "underlying economic facts" make it so.

The average lawyer, seeking to advise his client, must gain only bewilderment and confusion by comparing the facts in this case with those of the *Houston Chronicle* case[3] decided by the Board the same day. Diligent inquiry has disclosed no injustice or maladministration worked by geographically variant interpretations of the above named Federal Statutes by Federal Courts, but, if the Board had some other basis than geographical situs for its ruling in the *Houston Chronicle* case, we are unable to locate it in the record. Mindful of the Board's expert infallibility, the inquiring lawyer can only conclude that in Texas, or at least Houston, all the conditions of the relation did not require protection, and that there the economic facts of the relation disclosed that entrepreneurial enterprise still flourished in the news vending business.

But whatever the reasons, if any, actuating the Board, no amount of legal discussion of the national uniformity intended by Congress can disguise or conceal the undeniable fact that this Board of experts, within the space of a single day, reached diametrically opposing conclusions on two practically indistinguishable sets of facts. This embarrassingly ubiquitous circumstance, together with the excellent record of the Federal Courts of the United States for intelligent, logical and precedential uni-

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[3]28 N. L. R. B. 1043.

formity of interpretation of national social legislation, make an exceedingly unstable foundation upon which to erect a case for uniformity for the Board or for invidious comparison with the record of the Federal Courts.

The Board's decisions, unhampered by precedent and veered and diverted by the Board's peculiar, vagrant and day to day conceptions of economic needs belie the attributed uniformity. The two cases, one arising in Los Angeles and one in Houston, were disposed of by application of no known principles or previously disclosed courses of reasoning. *Ex post facto* administrative law making was the device used to enlarge the limit of the Board's limited jurisdiction, and the exercise of such enlarged jurisdiction was and will be governed by uncontrolled and unpredictable notions of economics.

We respectfully submit that a rehearing should be granted so that the erratic wanderings of the Board from the paths charted by the precedents above referred to may be checked and delimited.

2. The Court Has Upheld the Board's Findings of Fact Affecting a Group of 210 to 219 Vendors but Actually Based on the Testimony of Only a Select Few of the Group.

The majority opinion of the Court that "The record sustains the Board's findings . . ."[4] misconceives or overlooks the arguments of this Respondent contained on pages 55 to 92 of its brief. Because of our belief in the merit of those arguments and our consciousness of the dangers inherent in the practices of the Board, sanctified

[4]Opinion, pp. 15-16.

by that portion of the opinion above quoted, we feel impelled to re-emphasize our opinion that inferences drawn from a "spot check" of a few carefully chosen witnesses are not "substantial evidence" supporting findings affecting an entire group.

We assume, from the following language of the opinion, viz.: "Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied"[5] that "tests" must or may be applied to determine on which side large numbers fall. It seems self-evident that a "test" is a norm or a guide which when applied to a particular state of facts will result in a determination, in this and like cases, of the existence or nonexistence of the status of employment.

If the test be ". . . that the particular workers . . . . are subject, *as a matter of economic fact*,[6] to the evils the statute was designed to eradicate . . . ."[7] then, it seems to us, there must be evidence in the record that all of such workers are "as a matter of economic fact," subject to those evils.

If the test be ". . . when the particular situation of employment combines these characteristics so that the economic facts of the relation make it *more nearly* one of employment than of independent enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal

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[5]Opinion, p. 11.

[6]Italics here and elsewhere in this petition ours unless otherwise noted.

[7]Opinion, p. 12.

classifications for purposes unrelated to the statute's objectives and bring the relation within its protections,"[8] then there must be evidence in the record establishing the existence of these combined characteristics as to every vendor in the unit and establishing the "economic facts" of the relation of every vendor in the unit which make each such relation "more nearly one of employment."

It is clear, as hereinabove pointed out, that the majority opinion in this case does not describe or define the "test" to be used, but whatever it is, it should be, under the circumstances disclosed by this record, applied to each individual of a group not to selected "samples" thereof, without substantial or any proof that the Board sponsored "samples" are either typical or representative of the group.

We emphasize this point because of our belief that this case is, in the issue here discussed, unprecedented and the gravity and importance of the issue has been lost sight of. We say it is unprecedented because so far as diligent research has disclosed, this is the first case reaching an Appellate Court wherein an alleged employer has not only contended but proved that no one of the principal tests or indicia of employment relied upon by the Board as indicating that status was universally applicable even to the chosen few witnesses sponsored by the Board.

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[8]Opinion, p. 13.

There was no such issue in the *Blount* case,[9] nor in the various cases cited in the Court's opinion, treating of the status of an individual employee,[10] or the employer's tort liability for the acts of such individuals.[11]

We say the gravity and importance of the decision lies in this: The Board is now investigator, prosecutor and judge. This opinion sanctifies the "Gerrymandering" of units and the handpicking of the witnesses desired by the Board to give form and color to the exemplar of the unit thus chosen.

Moreover, this archetype may apparently be an individual, if one exists, or, as in this case, a composite formed from the testimony not only of various witnesses in this case but (despite the Board's denial) of the testimony of witnesses in the other cases tried at the same time.

We say that this conclusion may be fairly and properly drawn: If the Board may conclude that employment status exists from the testimony of 15 witnesses out of 219 alleged employees in the group, it may base the same

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[9] *N. L. R. B. v. Blount*, 131 Fed. (2d) 585.

[10] *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244; *Walker v. Altmeyer*, 137 L. Ed. (2d) 531.

[11] *Milk Wagon Drivers Union No. 753 v. Lake Farm Products, Inc.*, 311 U. S. 91; *International Ass'n of Machinists v. N. L. R. B.*, 311 U. S. 72; *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514; *N. L. R. B. v. Condenser Corp. of America*, 128 Fed. (2d) 67; *North Whittier Heights Citrus Ass'n v. N. L. R. B.*, 109 Fed. (2d) 76.

finding on the sole testimony of one witness out of 1,000 alleged employees.

It is no answer to say that the alleged employer may put on as many witnesses as he wishes to contravert this one witness. Such witnesses, irrespective of their number, create, according to the Board's view of it, only a conflict which the Board alone may determine. Experience demonstrates that the Board suffers from that myopia characteristic of the offspring of the miscegenetic union of prosecutor and judge, which prevents it from "seeing" evidence adduced, in conflict with that produced by its own agents.

Weighing this Court's summary of the conclusions found by the Board,[12] we find:

No evidence whatever supporting the conclusion that "the designated newsboys work continuously and regularly . . ." other than the inference that if they are to come within the unit they must sell five or more (not all) of the editions published five days (out of the six publishing days) a week. No evidence whatever supporting the conclusion that the vendors ". . . rely upon their earnings for the support of themselves and their families . . ." other than the hearsay testimony of the organizer of the Union, as follows: ". . . and that probably have families and lots of them—most of them do have families—and men that depend on that work for

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[12]Opinion, p. 15.

their livelihood." [R. 860.] The conclusion "Their hours of work . . . are supervised and to some extent prescribed by the publishers or their agents," was based on the testimony of five vendors, despite the facts that this testimony was controverted by the Board's own witnesses; that other vendors testified that they personally came and went as they pleased and *the remaining vendors called as Board witnesses were not questioned and gave no testimony concerning hours.*[13] The conclusions that ". . . their efforts on the job are supervised and to some extent prescribed by the publishers or their agents," is wholly unsupported by evidence.[14]

The remaining conclusions ". . . and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers . . . Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publishers' benefit," aptly describe the elements of practically every existing arrangement for the retail sale of proprietary, trade-marked or patented articles.

Thus the Board's findings, in so far as they attempt to bring these vendors "within this Act" and to differentiate them from those vendors "beyond its coverage"

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[13]Respondent's Brief, pp. 88-90.

[14]Respondent's Brief, pp. 84-87.

are based on nothing more substantial than inferences drawn from the testimony of a few Board-sponsored and selected witnesses, much of whose testimony is flatly contradicted by or inapplicable to the other witnesses called by the Board itself.

For this reason alone, a rehearing should be granted so that this Court may remand the case to the Board for the purpose of developing adequate testimony concerning the relationships of each and all of the vendors within the unit to the publisher.

Respectfully submitted,

H. S. MacKay, Jr.,

Edward L. Compton,

Attorneys for Respondent and Petitioner, Hearst Publications, Incorporated.

Certificate of Counsel.

We, counsel for petitioner, certify that the aforegoing petition is presented in good faith and not for the purpose of delay, and that, in our opinion, it is well founded.

May 16, 1944.

H. S. MacKay, Jr.,

Edward L. Compton.